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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RAYFORD CHRISTIAN NORRIS, Defendant and Appellant.	E063359 (Super.Ct.No. SWF1400736) OPINION

APPEAL from the Superior Court of Riverside County. Becky Dugan, Judge. Affirmed.

Allison H. Ting, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Brendon W. Marshall, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Rayford Christian Norris challenges the trial court's denial of the request for reduction of his conviction of second degree burglary as a felony to misdemeanor shoplifting. We affirm.

STATEMENT OF FACTS

In February 2014 the People filed a felony complaint charging Norris with the burglary (Pen. Code, § 459)[1] of a "Boot Barn," and a different burglary at a "Turner's Outdoorsman," as well as misdemeanor vandalism (§ 594) and giving false identification to a police officer. (§ 148.9.) In March Norris pleaded guilty to the two counts of burglary and admitted having served two prior prison terms within the meaning of section 667.5, subdivision (b). Pursuant to a plea agreement, he was sentenced to a total term of four years.

Nine months later, defendant filed a petition for resentencing under section 1170.18[2] using a form apparently created by the Riverside courts. In the form, defendant alleged that he had been convicted of "Penal Code §459 2nd Degree Burglary (Shoplifting)." Defendant also checked the box for the statement "Defendant believes the

[1] All subsequent statutory references are to the Penal Code.

[2] That statute allows "[a] person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ("this act") had this act been in effect at the time of the offense may petition for a recall of [his] sentence before the trial court . . . to request resentencing in accordance with . . . Section 459.5 . . . of the Penal Code . . . ."

value of the check or property taken does not exceed $950." No other relevant allegations were made.

The People filed a form opposition asserting that defendant was not entitled to the relief requested because of "Closed businesses."

There is no reporter's transcript of the hearing on defendant's request, but the trial court's order repeats "his burglaries were at closed businesses. He is not eligible for relief."

The record on appeal affords no further elucidation of the circumstances surrounding defendant's crimes.[3] Defendant asserts that the trial court's determination was therefore improper and that his request for resentencing should have been granted. Defendant misconceives the location of the burden of proof.

DISCUSSION

Proposition 47, as enacted in 2014, created a new offense numbered section 459.5 of the Penal Code and denominated "Shoplifting." That section in effect creates a lesser offense to commercial burglary *if* entry with intent to commit larceny takes place "while that establishment is open during regular business hours" and the value of the property taken (or intended to be taken) does not exceed $950.

In *People v. Sherow* (2015) 239 Cal.App.4th 875, 880 (*Sherow*), also a case involving section 459.5, Division One of this court placed the burden of proving

[3] The record does not contain a probation report (if one was prepared) or a police report relating to the 2014 convictions. (Cf. *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444 (*Rivas-Colon*).)

eligibility for resentencing squarely on the defendant. (*Accord*, *Rivas-Colon*, *supra*, 241 Cal.App.4th at p. 449.) We agree. A defendant who seeks resentencing under section 1170.18 has already been convicted of a felony. Depending on the circumstances surrounding the offense, he or she may, or may not, be eligible for resentencing, and in the case of a burglary conviction, for example, entitlement to resentencing is *not* automatic. If the defendant entered a commercial establishment during regular business hours and did not steal property worth more than $950,[4] he or she committed only shoplifting and may be resentenced; otherwise not. Although *Sherow* and *Rivas-Colon* involved the monetary trigger point, the same analysis applies to the factor of having entered during regular business hours. A defendant in Norris's shoes does not establish eligibility without demonstrating that he was guilty *only* of shoplifting, and that requires a showing both as to the amount of the theft and that the business was in fact open. The record being wholly devoid of information on the second point, it is clear that defendant failed to carry his burden of showing that he was eligible for resentencing.[5]

Defendant argues that the determination of eligibility must be made solely on the record of conviction in the underlying matter, citing inter alia *People v. Guerrero* (1988)

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[4] We note that the record is similarly devoid of evidence on this point, although defendant's form request included the statement that he "believes" the value of the property involved was less than $950. We assume that the People consider this sufficient to carry the initial burden, and express no view on this point.

[5] As suggested above, the record does not disclose what information or documentation the court relied upon in concluding that defendant had entered a closed business. As was the case in *Rivas-Colon*, we express no view as to what evidence the court could properly consider. (241 Cal.App.4th at p. 450, fn. 3.)

44 Cal.3d 343, 352 (*Guerrero*). But because the burden is on defendant, this would not assist him, as the record is blank. In any event, if it were necessary to do so, we would disagree at least on the point that a *defendant* would be so limited.

Guerrero involved a situation in which the burden was on the *prosecution* to establish that a prior conviction constituted a serious or violent felony for enhancement purposes. (See *People v. Towers* (2007) 150 Cal.App.4th 1273, 1277 [on the burden of proof in that context].) Although we need not decide the point here, it seems clear that a defendant who has the burden of proving a fact that may well have been irrelevant to the previous proceeding should not be prohibited from introducing new evidence. Defendants who resolved a case by plea would be especially prejudiced by a strict application of the "record of the conviction" rule. (*Ibid*.) For example, in this case there was no reason for either party to fix the value of the property stolen or the time of day of the offense when the plea was taken. (See *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1333-1334 (*Bradford*) [noting that a prosecutor in a previous proceeding would have had no incentive to plead and prove factors not relevant to that case, but which would later become relevant to resentencing under section 1170.126].)[6]

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[6] We recognize that in *Bradford*, *supra*, 227 Cal.App.4th 1322, the court held that the *exceptions* to eligibility under section 1170.126 could only be demonstrated by the People through resort to the official "record of conviction" in the original proceeding. The difference between that approach and ours can be explained by the fact that under section 1170.18, we place the burden of establishing eligibility on the defendant, and eligibility includes demonstrating that the underlying offense (in this case) met the express requirements for shoplifting under section 459.5. Under section 1170.126, it appears that the prosecution has the burden of showing that an exception to eligibility applies, at least when ineligibility depends upon a fact relating to the crime rather than a

[footnote continued on next page]

However, as we noted above, all that we need say is that nothing in the *current* record establishes that defendant was eligible.

Finally, defendant argues that we should remand so that he can improve his presentation, citing *Sherow*, *supra*, 239 Cal.App.4th at pp. 880-881. *Sherow* simply affirmed without prejudice to the filing of a new petition in the trial court. Our role is to determine whether the order made in this case was correct. It was. What further steps defendant chooses to take is up to him.

DISPOSITION

The judgment is affirmed.

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McKINSTER
J.

We concur:

RAMIREZ
P. J.

CODRINGTON
J.

[footnote continued from previous page]
conviction itself, e.g., the defendant's use of a weapon or intent to cause serious bodily harm. (§ 1170.126, subd. (e)(2), cross-referencing §§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii); see *Bradford* at p. 1341.) Thus, limiting the evidence on which the People may rely by analogy to *Guerrero* is logical.